CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79–324

ESTATE OF W. T. GRANT COMPANY (BANKRUPT)

Appellant,

vs.

GERALD A. LEWIS, Comptroller of the State of Florida, REUBIN O'D ASKEW, Governor, ROBERT L. SHEVIN, Attorney General, GERALD A. LEWIS, Comptroller, DOYLE CONNER, Commissioner of Agriculture, WILLIAM GUNTER, Treasurer, RALPH D. TURLINGTON, Commissioner of Education, and the Governor and Cabinet as head of the Department of Revenue; and THE DEPARTMENT OF REVENUE, State of Florida.

Appellees.

JURISDICTIONAL STATEMENT
ON APPEAL FROM THE SUPREME COURT OF FLORIDA

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JURISDICTIONAL STATEMENT

Appellant, ESTATE OF W. T. GRANT COMPANY (BANKRUPT) (hereinafter referred to as Grant) files this Jurisdictional Statement pursuant to Rules 13 and 15, Supreme Court Rules.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79–324

ESTATE OF W. T. GRANT COMPANY (BANKRUPT)

Appellant,

vs.

GERALD A. LEWIS, Comptroller of the State of Florida, REUBIN O'D ASKEW, Governor, ROBERT L. SHEVIN, Attorney General, GERALD A. LEWIS, Comptroller, DOYLE CONNER, Commissioner of Agriculture, WILLIAM GUNTER, Treasurer, RALPH D. TURLINGTON, Commissioner of Education, and the Governor and Cabinet as head of the Department of Revenue; and THE DEPARTMENT OF REVENUE, State of Florida.

Appellees.

JURISDICTIONAL STATEMENT
ON APPEAL FROM THE SUPREME COURT OF FLORIDA

A. OFFICIAL AND UNOFFICIAL REPORTS.

Appellant Grant appeals to this Court from the decision of the Supreme Court of Florida reported as *Estate of W. T. Grant Co. v. Lewis*, 370 So. 2d 764 (Fla. 1979), affirming the decision of the District of Appeal, First District of Florida, reported as *Estate of W. T. Grant Co. v. Lewis*, 358 So. 2d 76 (Fla. 1st DCA 1978). Conformed copies of these opinions are included in the Appendices to this Jurisdictional Statement.

B. STATEMENT OF GROUNDS FOR JURISDICTION.

(i) *Nature of Proceeding and Statute Pursuant to Which Brought.*

This proceeding was initiated by Grant's application for a refund of Florida sales tax paid on the unpaid balance due on accounts which were found to be worthless and which were charged off as bad debts for federal tax purposes. This application was made to the Comptroller of the State of Florida pursuant to Section 212.17, Florida Statutes (1975). The Comptroller denied the refund, and Grant appealed this final administrative action to the District Court of Appeal, First District Court of Florida. The District Court, First District, affirmed the denial, and Grant appealed to the Supreme Court of Florida. The Supreme Court of Florida affirmed the decision of the District Court of Appeal, First District.

(ii) *Date of Judgment Sought to be Reviewed.*

The decision of the Supreme Court of Florida sought to be reviewed was rendered March 29, 1979. Grant filed a Motion for Rehearing which was denied by the Supreme Court of Florida on Wednesday, May 30, 1979. Grant filed its Notice of Appeal in both the Supreme Court of Florida and the District Court of Appeal, First District of Florida, on August 16, 1979. Conformed copies of these notices are included in the Appendices hereto.

(iii) *Statutory Provision Conferring Jurisdiction.*

The Court's jurisdiction of this appeal is conferred by Title 28, Section 1257(2), United States Code (Supp. 1979).

(iv) *Cases Sustaining Jurisdiction*

The most recent of several cases sustaining jurisdiction are *Huffman v. Pursue, Ltd.*, 420 U. S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 482 (1975), rehearing denied, 421 U. S. 971, 95 S.Ct. 1969, 44 L.Ed. 2d 463 (1975); *WHYY, Inc. v. Borrough of Glassboro*, 393 U. S. 117, 89 S.Ct. 286, 21 L.Ed. 2d 242 (1968); *Warren Trading Post v. Arizona State Tax Commission*, 380 U. S. 685, 85 S.Ct. 1242, 14 L.Ed. 2d 165 (1965); *American Oil Co. v. Neill*, 380 U. S. 451, 85 S.Ct. 1130, 14 L.Ed. 2d 1 (1965).

(v) *State Statute Involved.*

In the Supreme Court of Florida, the validity of Section 212.17, Florida Statutes (1975), was drawn into question, and the Supreme Court of Florida upheld the validity of the statute. Section 212.17, Florida Statutes (1975), may be found in Volume 1, Florida Statutes, 1975 Edition, at Page 902. The text of this statute is lengthy and is set forth verbatim in the Appendices hereto.

C. QUESTIONS PRESENTED.

This appeal presents the following two questions: (1) Whether Section 212.17, Florida Statutes (1975), which has been construed by the Supreme Court of Florida to bar Grant from obtaining a refund for sales tax paid on the unpaid balance due on accounts which have been found to be worthless and have been charged off as bad debts for federal tax purposes, is unconstitutional as applied to Grant as being in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution; (2) Whether Section 212.17, Florida Statutes 1975),, which has been construed by the Supreme Court of Florida to bar Grant from obtaining a refund for sales tax paid on the unpaid balance due on accounts which have been found to be worthless and have been charged off as bad debts for federal tax purposes, is unconstitutional as applied to Grant as being inconsistent with the Federal Bankruptcy Act, Title 11, United States Code.

D. STATEMENT OF THE CASE.

Appellant Grant was adjudicated bankrupt on April 13, 1976 by the United States District Court for the Southern District of

Florida. Prior to this adjudication, Grant operated numerous retail stores in the State of Florida. Grant's sales consisted of cash sales and sales made pursuant to several different types of credit plans. Grant paid Florida sales tax on both cash and credit sales at the time the sales were made. However, many of the accounts receivable resulting from credit sales were found to be uncollectable and worthless and were written off Grant's books. Sales tax paid on these accounts totals $520,060.00.

On March 24, 1977, Grant applied to Gerald A. Lewis, Comptroller of the State of Florida, for a refund of this $520.060.00 sales tax pursuant to Section 212.17, Florida Statutes (1975). Lewis denied Grant's request for refund on the ground that Section 212.17 does not provide for a refund of sales tax paid on the unpaid balance due on accounts which have been found to be worthless and are actually charged off for federal income tax purposes.

On July 28, 1977 Grant filed a Petition for Review in the District Court of Appeal, First District of Florida, of the administrative action of Lewis and the other Appellees (hereinafter referred to as the State) denying Grant's request for refund. In its Petition for Review, Grant raised the federal question that the State's denial of Grant's request for refund constituted a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. In its initial appellate brief in the District Court of Appeal, First District of Florida, filed on or about September 28, 1977, Grant raised the additional federal question that the State's denial of Grant's request for refund pursuant to Section 212.17, Florida Statutes (1975), constituted a violation of the Supremacy Clause of the United States Constitution as being inconsistent with the Federal Bankruptcy Act. Both these federal questions were directly passed upon by the District Court of Appeal, First District of Florida, in its decision rendered April 21, 1978, rehearing denied March 23, 1978.

On June 19, 1978 Grant filed a Notice of Appeal invoking the appeal jurisdiction of the Supreme Court of Florida. In its initial brief in the Supreme Court of Florida, Grant again raised and preserved the two federal questions sought to be reviewed by this

Court. Both these federal questions were passed upon directly by the Supreme Court of Florida in its decision rendered March 29, 1979, rehearing denied May 30, 1979.

E. FEDERAL QUESTIONS SUBSTANTIAL.

The federal questions involved in this appeal are substantial See *Zucht v. King,* 260 U. S. 174 (1922). The first federal question is that Section 212.17, Florida Statutes (1975), as construed by the Supreme Court of Florida, is unconstitutional as being in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. This federal question arises because the construction placed on the statute by the Supreme Court of Florida carves out a particular class of taxpayers –bankrupts–and denies them refunds. All other persons who have paid Florida sales tax on sales which have been frustrated or thwarted are entitled to reimbursement under Section 212.17, Florida Statutes (1975). Taxpayers who have remained in business receive a credit for return of purchases, repossession of collateral and bad debts. Taxpayers who retire from business are entitled to a refund for return of purchases and repossession. They can also plan the close of their business to take advantage of credits for taxes paid on sales which subsequently have been written off as bad debts. Of all these situations, only the bankrupt is denied reimbursement.

This classification carved out by Section 212.17, Florida Statutes (1975), as construed by the Supreme Court of Florida, is palpably arbitrary and capricious. There is no reasonable distinction among return of purchases, repossessions and bad debts to justify the classification. Under these circumstances, where there is no fair and substantial relation between the classification and the object of the legislation, this Court has held that the legislation violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. See *Kahn v. Shevin,* 416 U. S. 351, 94 S.Ct. 1734, 40 L.Ed. 2d 189 (1974); *Allied Stores of Ohio v. Bowers,* 385 U. S. 522, 2 L.Ed. 2d 480 (1959).

The second federal question involved in this appeal is whether Section 212.17, Florida Statutes (1975), which has been construed by the Supreme Court of Florida to bar Grant from obtaining a refund, violates the Supremacy Clause of the United States Constitution as being inconsistent with the Federal Bankruptcy Act. This is likewise a substantial question in the light of a recent decision of this Court and several other federal court decisions.

In *Perez v. Campbell*, 402 U. S. 637, 29 L.Ed. 2d 233, 91 S.Ct. 1704 (1971), the Court invalidated an Arizona motor vehicle responsibility statute under which a bankrupt's driver license was suspended for failure to satisfy a judgment for personal injury and property damage caused in a traffic accident. This Court held that the statute conflicted with the policy of the Federal Bankruptcy Act in that the challenged state statute stood as an obstacle to the accomplishment and execution of the full purposes and objectives of the Congress. Likewise, in the instant case the injurious impact of Section 212.17, Florida Statutes (1975), as construed by the Supreme Court of Florida, falls heavily, if not exclusively, upon the bankrupt.

Section 212.17, Florida Statutes (1975), as construed by the Supreme Court of Florida, also is inconsistent with the Federal Bankrupt Act for another reason. Since it has been applied to deny Grant a refund of Florida sales tax, the statute operates to deny to the trustee in bankruptcy assets which ordinarily could be reached to satisfy the claims of general creditors. It was held in *In Re Kanter*, 505 F. 2d 228 (9th Cir. 1974), that such legislation frustrates the full effectiveness of the Federal Bankruptcy Act and is rendered invalid by the Supremacy Clause of the United States Constitution.

Finally, Section 212.17, Florida Statutes (1975), as construed by the Supreme Court of Florida, is inconsistent with the Federal Bankruptcy Act because it has the effect of prohibiting a taxpayer from taking advantage of the Federal Bankruptcy Act. It has been held in federal courts that a state statute having that effect is unconstitutional as being in violation of the Supremacy Clause of the United States Constitution. *Rutledge v. City of Shreveport*, 387

F. Supp. 1277 (W. D. La. 1975). See also *Girardier v. Webster College*, 563 F. 2d 1267 (8th Cir. 1977); *Matter of Loftin*, 327 So. 2d 543 (La. App. 1976); *Grimes v. Hoschler*, 12 Cal. 3d 305, 115 Cal. Rptr. 625, 525 P. 2d 65 (1974).

CONCLUSION

For the reasons set forth in the foregoing Jurisdictional Statement, this Court has appeal jurisdiction over this cause.

Respectfully submitted,
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August 23, 1979

APPENDICES

APPENDICES

APPENDIX A:
Section 212.17, Florida Statutes 1975

APPENDIX B:
Estate of W. T. Grant Co. v. Lewis, 370 So.2d 764 (Fla. 1979)

APPENDIX C:
Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76 (Fla. 1st DCA 1978)

APPENDIX D:
Notice of Appeal in Supreme Court of Florida

APPENDIX E:
Notice of Appeal in District Court of Appeal, First District

212.17 Credits for returned goods, rentals or admissions; additional powers of department.–

(1) In the event purchases are returned to the dealer by the purchaser or consumer after the tax imposed by this chapter has been collected or charged to the account of the consumer or user, the dealer shall be entitled to reimbursement of the amount of tax collected or charged by him, in the manner prescribed by the department; and in case the tax has not been remitted by the dealer to the department, the dealer may deduct the same in submitting his return upon receipt of a signed statement of the dealer as to the gross amount of such refunds during the period covered by said signed statement, which period shall not be longer than 90 days. The department shall issue to the dealer an official credit memorandum equal to the net amount remitted by the dealer for such tax collected. Such memorandum shall be accepted by the department at full face value from the dealer to whom it is issued, in the remittance for subsequent taxes accrued under the provisions of this chapter; provided, in cases where a dealer has retired from business and has filed a final return, a refund of tax may be made if it can be established to the satisfaction of the department that the tax was not due.

(2) A dealer who has paid the tax imposed by this chapter on tangible personal property sold under a retained title, conditional sale, or similar contract, or under a contract wherein the dealer retains a security interest in the property pursuant to chapter 679, may take credit or obtain a refund for the tax paid by him on the unpaid balance due him when he repossesses (with or without judicial process) the property, in the same manner as he may obtain a credit or a refund under subsection (1) of this section upon the return of purchases. When such repossessed property is resold, the sale is subject in all respects to the tax imposed by this chapter.

(3) A dealer who has paid the tax imposed by this chapter on tangible personal property may take credit in any return filed under the provisions of this chapter for the tax paid by him on the unpaid balance due on accounts which during the period covered by the current return have been found to be worthless and are

actually charged off for federal income tax purposes; provided, that if any accounts so charged off are thereafter in whole or in part paid to the dealer, the amount so paid shall be included in the first return filed after such collection and the tax paid accordingly.

(4) The department shall design, prepare, print and furnish to all dealers, or make available to said dealers, all necessary forms for filing returns and instructions to insure a full collection from dealers and an accounting for the taxes due, but failure of any dealer to secure such forms shall not relieve such dealer from the payment of said tax at the time and in the manner herein provided.

(5) The department and its assistants are hereby authorized and empowered to administer the oath for the purpose of enforcing and administering the provisions of this chapter.

(6) The department shall have the power to make, prescribe and publish reasonable rules and regulations not inconsistent with this chapter, or the other laws, or the constitution of this state, or the United States, for the enforcement of the provisions of this chapter and the collection of revenue hereunder, and such rules and regulations shall when enforced be deemed to be reasonable and just.

(7) The department, where admissions or rental payments are made and thereafter returned to the payers, after the taxes thereon have been paid, shall return or credit the taxpayer for taxes so paid on the moneys returned in the same manner as is provided for returns or credits of taxes where purchases or tangible personal property are returnable to a dealer.

History.–s. 17, ch. 26319, 1949; s. 7, ch. 63-253; s. 5, ch. 65-371; s. 2, ch. 65-420; s. 14, ch. 67-180; s. 1, ch. 67-518; ss. 21, 35, ch. 69-106.

APPENDIX B

ESTATE of W. T. GRANT COMPANY
(Bankrupt), Appellant

v.

Gerald A. LEWIS, etc., et al., Appellees.

No. 54431

Supreme Court of Florida.

March 29, 1979.

Rehearing Denied May 30, 1979.

An Appeal from the District Court of Appeal, First District.

Robert M. Ervin, Joseph C. Jacobs, James R. McCachren, Jr. and Robert J. Angerer of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for appellant.

Eugene J. Cella, General Counsel, and Harold F. X. Purnell, Asst. Atty. Gen., Tallahassee, for Appellees.

PER CURIAM.

The decision of the District Court of Appeal, First District, in *Estate of W. T. Grant Co. v. Lewis*, 358 So.2d 76 (Fla. 1st DCA 1978), affirming the decisions of the state comptroller and the Department of Revenue denying Grant's request for a sales tax refund and upholding the constitutionality of sections 212.17 and 215.26, Florida Statutes (1975), is before us for review on direct appeal. We agree with the logical and well reasoned opinion of the district court and, accordingly, affirm.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.

ADKINS, J., dissents.

APPENDIX C

ESTATE of W. T. GRANT COMPANY
(Bankrupt), Petitioner,

v.

Gerald A. LEWIS, Comptroller of the State of Florida, Reubin O'D Askew, Governor, Robert L. Shevin, Attorney General, Gerald A. Lewis, Comptroller, Doyle Conner, Commissioner of Agriculture, William Gunter, Treasurer, Ralph D. Turlington, Commissioner of Education, and Bruce A. Smathers, Secretary of State, as and constituting the Governor and Cabinet as heads of the Department of Revenue and the Department of Revenue, State of Florida, Respondents.

No. GG–471.

District Court of Appeal of Florida,

First District.

April 21, 1978.

Rehearing Denied May 23, 1978.

Robert M. Ervin, Joseph C. Jacobs, James R. McCachren, Jr. and Robert J. Angerer, of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for petitioner.

Robert L. Shevin, Atty. Gen., and Harold F. X. Purnell, Asst. Atty. Gen., for respondents.

MASON, ERNEST E. (Circuit Judge, Retired), Associate Judge.

On July 28, 1977, petitioner, Estate of W. T. Grant Company (Grant) filed this petition for review, seeking review of the decisions of the respondents, State Comptroller and The Department of Revenue (the Department), denying Grant's request for a sales tax refund.

Prior to its adjudication as a bankrupt on April 13, 1976, by the United States District Court for the Southern District of Flor-

ida, Grant operated numerous retail stores in the State of Florida. Grant's sales consisted of cash sales and sales made pursuant to several different types of credit plans. Grant paid Florida sales taxes on both cash and credit sales at the time the sales were made.

Grant on March 29, 1977, requested the refund of $520,060.00 in sales taxes pursuant to the provisions of F. S. 215.26. The reason given in the refund application was that an "overpayment of Florida's sales tax in the amount of $520,060.00" had been made. The refund application admitted that Grant had made numerous "sales" pursuant to several different types of credit plans, with the sales tax collected on the credit sales "at the time the sale was made." The applicant went on to note that many of the accounts receivable resulting from the credit sales were later found to be uncollectable and were written off the company's books, and because of its adjudication as bankrupt, it was no longer possible to offset bad debts against future retail sales.

By letter dated April 15, 1977, the Office of the Comptroller notified the Petitioner that the Florida Department of Revenue had audited its claim for refund and had recommended that payment of the refund be denied because the petitioner did not claim credit for the tax paid on its bad debts in the manner required by Section 212.17(3), Florida Statutes (1975).

On May 3, 1977, petitioner, through its trustee in bankruptcy, filed a request for a rehearing and re-examination of the denial of its claim for a refund of overpayment of Florida sales tax in the amount of $520,060.00. Petitioner made its claim pursuant to Section 215.26, Florida Statutes (1975). It also claimed that Section 212.17(3), Florida Statutes (1975), should entitle it to a refund in the amount requested.

By letter dated June 3, 1977, the Department of Revenue, on behalf of the Comptroller of the State of Florida, denied petitioner's request for a rehearing and re-examination. Those agencies had concluded that neither Section 215.26 nor Section 212.17(3) authorized a refund of sales tax paid on the unpaid balance of the accounts which had been found to be worthless and had been written off as bad debts. By letter dated July 1,

1977, petitioner received official notification, in accordance with Chapter 17, Florida Statutes, from the Office of the Comptroller that its request for rehearing and re-examination had been denied.

On July 28, 1977, petitioner filed its petition for review in this Court for review of the respondent Agencies' final agency action denying petitioner's request for a refund under Section 215.26 or 212.17(3), Florida Statutes (1975), or both of these statutes.

We have jurisdiction to review the final action of respondents denying the refund of the taxes in question under authority of Article V, Section 4(b), of the Florida Constitution (1968 Revision as amended in 1973) and Section 120.68, Florida Statutes, as amended in 1976 and 1977. Respondents' contention that jurisdiction lies solely in the Circuit Court is not well taken for the reason that this proceeding does not involve the legality of a tax assessment or toll, as claimed by respondents, but rather involves solely the question of petitioner's right to a refund of sales taxes lawfully assessed in the first instance but for which petitioner contends it became entitled to a refund due to a condition arising subsequent to the assessment. This being true the recent decision of the Supreme Court of *Department of Revenue v. Amrep Corporation*, 358 So.2d 1343 (Fla. 1978), cited by respondents' to this Court on March 16, 1978, does not support respondents' position that we lack jurisdiction.

We now direct our attention to the merits of the case. Our decision turns upon the proper interpretation of certain sections of Chapter 215 F. S. and Chapter 212 F. S. Petitioner predicates its claim for a refund of the taxes in question upon the provisions of Section 212.17 and Section 215.26.

[1] Section 212.17 which deals with credits for returned goods provides that such credits may be had in one of three situations: First, in the event purchases are returned to the dealer by the purchaser or consumer after the sales tax imposed has been collected by the seller or charged by him to the account of such purchaser or consumer, the dealer (seller) shall be entitled to reimbursement of the tax collected or charged, in the manner prescribed by the Department of Revenue. And in case the tax has

not been remitted by the dealer to the department, the dealer may deduct the same in subsequently submitting his return, upon receipt by the department of a signed statement of the dealer as to the gross amount of such returned goods during the period covered by such signed statement which period shall not be longer than 90 days. In the event the dealer has already remitted the tax paid to him upon such later returned goods, the department shall issue to the dealer a credit memorandum equal to the net amount so remitted to be applied against subsequently accrued taxes. Further provision is made for the *refund* of taxes to a dealer who has *retired* from business and who has filed a final return, if it is established that the taxes were not due. (Emphasis supplied). Section 212.17(1) F. S.

Clearly petitioner's claim for a refund of taxes already paid by it does not fall within these provisions for they deal solely with returned goods which may be subsequently re-sold, and another sales tax collected or charged upon such re-sold goods. Nor can petitioner's claim be predicated upon its status as a dealer who has retired from business and who is entitled to a refund of taxes remitted upon the theory that the tax was not due. The taxes paid by petitioner and for which it now claims a refund for taxes paid on bad debts subsequently charged off became due when the sales were made and the purchasers at that time became obligated to pay the same (Section 212.06(1)(a)).

The second situation under which a dealer is entitled to a credit under the provisions of Section 212.17 is that where tangible personal property is sold under a retained title or conditional sale contract, and is later repossessed by the dealer. Subsection (2) of Section 212.17 provides that a dealer who has remitted the tax imposed may take credit in future tax returns for the tax paid by him on the unpaid balance of the purchase price when he repossesses the property, in the same manner as he may do so under subsection (1). And when such repossessed property is resold the sale is subject in all respects to the tax imposed by chapter 212 F. S. Here again the petitioner's claim does not fall within the provisions of this subsection (2) so as to entitle it to a refund, for the sales with which we are concerned here were not retained title or conditional sales, but were sales made pursuant to several

different types of credit plans. Here title passed to the purchaser upon delivery of the goods.

Petitioner places great reliance upon the provisions of subsection (3) of Section 212.17 to support its claim for a refund of taxes paid upon goods sold on credit which transaction later turned out to be "bad debts". This subsection provides that a dealer who has paid the tax imposed on the sale of tangible personal property may take credit in any return filed under the provisions of Chapter 212 for the tax paid by him on the unpaid balance due on accounts which during the period covered by the current return have been found to be worthless and are charged off for federal income tax purposes. The subsection provides, however, that if any charged off accounts are thereafter paid to the dealer, the dealer must report such amounts so subsequently received and pay the tax thereon in his first return filed after such payments are received by him.

Here again, the statute is dealing with credits against future taxes collected by the dealer or charged to the purchaser on future sales, not with refunds of taxes remitted to the department. Since petitioner went into bankruptcy and therefore is making no future sales or tax returns, there is nothing against which any credit may be had for "bad debts" charged off.

The only instance wherein a refund (as against a credit) may be made under this statute is that provided in subsection (1) of Section 212.17 wherein it is established and determined by the department that no tax was due to be paid in the first instance. Here it is conceded that the tax was collectible at the time of the sales, but asserted that a refund ought to be made because the charge accounts became sour and uncollectible, and therefore without consideration.

Petitioner's argument that because in many instances the purchase price was never paid there was no consummation of the sale, "and, in retrospect no tax was due when paid by Grant", is contrary to the express provisions of this statute. Section 212.02(4) defines the term "sales price" upon which the tax is to be paid as: ". . . the total amount paid for tangible personal property, including . . . any amount for which credit is given to

the purchaser by the seller, *without any deduction therefrom on the account of the cost of the property sold, the cost of materials used, labor or service costs, interest charged, losses or any other expenses* whatsoever." (Emphasis supplied). And Section 212.06(1)(a) as applied to credit sales states:

> "The full amount of the tax on credit sales, installment sales, and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale."

We hold that the provisions of Section 212.17(3) authorize only the extension of a credit or set-off against future tax liability and do not authorize refund of sales taxes collected on personal property sold on credit under the facts of this case.

[2] Petitioner bases its claim for the requested refund also upon the provisions of Section 215.26, F. S. We hold that petitioner's reliance upon this section of the tax laws of this state is not well taken. This section authorizes the State Comptroller to refund to any person entitled to receive it of any money paid into the State Treasury which constitute either:

(a) an overpayment of any tax, license or account due;

(b) a payment where no tax, license or account is due; or

(c) any payment made into the State Treasury in error.

Petitioner's request for a refund does not fall within either one of these categories and therefore the Comptroller was justified in his refusal to make such refund. See *State ex rel. Brunswick Corporation v. Kirk*, 204 So.2d 4 (Fla. 1967); *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954).

[3,4] Thirdly, the petitioner argues that to deny it the refund sought is to deny it due process and equal protection of the law. We reject this argument as not well founded. In the first place the Florida sales tax, being an excise tax is not subject to the constitutional requirements of equality and uniformity. Rather, the constitutional test to be applied to such a tax is whether the classifications created by such tax are reasonable and not arbitrary. *Goulden v. Kirk*, 47 So.2d 567 (Fla. 1950) and *Allied Stores of*

Ohio v. Bowers, 358 U. S. 522, 79 S.Ct. 437, 3 L.Ed.2d 480 (1959).

The classifications created by Section 212.17 are reasonable and not arbitrary. The allowance of a credit only as against future tax liability where the dealer has not reacquired title to and possession of the tangible personal property sold, and not a refund of taxes already paid, rests upon a rational and reasonable distinction. Repossessed property can be resold by the dealer and thereby generate further sales tax collection. Such is not true of tangible personal property that remains in the possession of the purchaser leaving the dealer with only a bad debt writeoff. The same distinction is true of returned personal property to the dealer by the purchaser where the sale was not made under a retained title contract, for here again the returned property can be resold and generate further sales tax collections.

[5] Finally, we find the argument of petitioner to the effect that to deny it a refund of the taxes in question is unconstitutional as being in violation of the Supremacy Clause of the Federal Constitution, in that such a construction of the effect of Section 212.17(3), F. S. allegedly interferes with the Federal Bankruptcy Act, to be without merit. The taxes sought to be recovered are not assets of the bankrupt estate. As we have herein stated, Section 212.17 deals with credits against future tax liability, not refunds of taxes already imposed and collected.

We affirm and dismiss the petition for review.

McCORD, C. J., and BOYER, J., concur.

APPENDIX D

IN THE SUPREME COURT OF FLORIDA

CASE NO. 54,431

ESTATE OF W. T. GRANT COMPANY (BANKRUPT)

Appellant,

vs.

GERALD A. LEWIS, Comptroller of the State of Florida; REUBIN O'D ASKEW, Governor, ROBERT L. SHEVIN, Attorney General, GERALD A. LEWIS, Comptroller, DOYLE CONNER Commissioner of Agriculture, WILLIAM GUNTER, Treasurer, RALPH D. TURLINGTON, Commissioner of Education, and BRUCE A. SMATHERS, Secretary of State, as and constituting the Governor and Cabinet as head of the Department of Revenue; and THE DEPARTMENT OF REVENUE, State of Florida,

Appellees.

FILED
AUGUST 16, 1979
CLERK SUPREME COURT

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Appellant, ESTATE OF W. T. GRANT COMPANY (BANKRUPT), appeals to the United States Supreme Court the decision of this Court rendered March 29, 1979, rehearing denied May 30, 1979. The nature of this decision is a decision where the validity of a state's statute has been drawn in question and this court held it valid under 28 USC, Section 1257.

Respectfully submitted,

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and

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and

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and

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APPENDIX E

THE FIRST DISTRICT COURT OF APPEAL
FIRST DISTRICT OF FLORIDA

CASE NO. 54,431

ESTATE OF W. T. GRANT COMPANY (BANKRUPT)

Petitioner/Appellant, DCA CASE NO. GG-471

vs.

GERALD A. LEWIS, Comptroller of the State of Florida; REUBIN O'D ASKEW, Governor, ROBERT L. SHEVIN, Attorney General, GERALD A. LEWIS, Comptroller, DOYLE CONNER Commissioner of Agriculture, WILLIAM GUNTER, Treasurer, RALPH D. TURLINGTON, Commissioner of Education, and BRUCE A. SMATHERS, Secretary of State, as and constituting the Governor and Cabinet as head of the Department of Revenue; and THE DEPARTMENT OF REVENUE, State of Florida,

FILED
AUGUST 16, 1979
CLERK SUPREME COURT

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Petitioner/Appellant, ESTATE OF W. T. GRANT COMPANY (BANKRUPT), appeals to the United States Supreme Court the decision of the Supreme Court of Florida rendered March 29, 1979, rehearing denied May 30, 1979. The nature of this decision is a decision where the validity of a state's statute has been drawn in question and the Court held it valid under 28 USC, Section 1257.

Respectfully submitted,

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1979

NO. 79-324

ESTATE OF W.T. GRANT COMPANY (BANKRUPT),

Appellants,

v.

GERALD A. LEWIS, Comptroller of the State of Florida, D. ROBERT GRAHAM, Governor, JIM SMITH, Attorney General, GERALD A. LEWIS, Comptroller, DOYLE CONNER, Commissioner of Agriculture, WILLIAM GUNTER, Treasurer, RALPH D. TURLINGTON, Commissioner of Education, and the Governor and Cabinet as head of the Department of Revenue; and THE DEPARTMENT OF REVENUE, State of Florida,

Appellees.

MOTION TO DISMISS OR AFFIRM

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Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Florida on the ground that the questions on which this appeal depends are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

A. STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AND THE NATURE OF THE CASE.

The State of Florida, like many other jurisdictions, imposes a sales tax on the privilege of engaging in various commercial transactions within its borders. This tax is imposed in Ch. 212, F.S. Section 212.05, F.S., imposes a tax on the privilege of engaging in the business of selling tangible personal property in the State of Florida. Subsection (1)(a) of Sec. 212.05, supra, levies a tax at the rate of four percent of the sales price of each item of tangible personal property sold in the state. As the Florida First District Court of Appeal pointed out below, Sec. 212.02(4), F.S., defines the term "sales price" as used in Ch. 212, F.S., to include ". . . the total amount paid for tangible personal property,

including . . . any amount for which credit is given the purchaser by the seller. . . ." Estate of W.T. Grant Co. v. Lewis, 358 So.2d 76, 79 (Fla. 1st DCA 1978). Along the same line, Sec. 212.06(1)(a), F.S., makes it clear that on credit sales, tax must be paid on the full amount of the purchase price at the time of the sale:

> The full amount of the tax on credit sales, installment sales, and sales made on any kind of deferred payment plan shall be due at the moment of the transaction in the same manner as a cash sale.

Thus, it is clear that under the Florida sales tax structure, the privilege of selling tangible personal property at retail in the state is taxed measured by the full sales price, including any amounts for which credit is extended to the purchaser by the seller.

The sales tax imposed by Ch. 212, F.S., is an excise tax imposed on the exercise of various commercial privileges

in the state, as construed by the Florida Supreme Court. Gauldin v. Kirk, 47 So.2d 567 (Fla. 1950). It is not an ad valorem or property tax, id, at 47 So.2d 574. It is placed under the administration of the Department of Revenue of the State of Florida (see Sec. 213.05, F.S.), the head of which is the Governor and Cabinet of the State of Florida. Section 20.21, F.S. The Department is charged with paying all sales taxes collected into the General Revenue Fund of the State of Florida. Section 212.20, F.S. The Department of Revenue, however, has no power or authority to draw money out of the State Treasury, including the General Revenue Fund.

The Constitution of the State of Florida, and specifically Art. IV, Sec. 4(d) thereof, gives the Comptroller of the State of Florida, presently the Hon. Gerald A. Lewis, the authority and responsibility to settle all

accounts against the State of Florida. Implementing this constitutional provision in part, Sec. 215.26, F.S., gives the Comptroller of the State of Florida the power to make tax refunds upon a showing by the taxpayer of any of three situations: (1) an overpayment of tax, (2) a payment where no tax is due, and (3) any payment made into the State Treasury in error. The Florida appellate court and Supreme Court below have held that where none of these three situations prevails, there is no statutory right to a tax refund. State ex rel. Brunswick Corporation v. Kirk, 204 So.2d 4 (Fla. 1967) and State ex rel. Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) out of the Florida Supreme Court are of the same accord.

Where sales made in the State of Florida on which sales tax has been paid prove uncollectible, Sec. 212.17(3), F.S.

1975, 1977, allows the seller to claim a credit or setoff against future tax liability in the amount of four percent of the uncollectible account on future returns the seller files with the Department of Revenue. The language of this statute clearly contains nothing allowing a refund to the seller where an account becomes uncollectible. In the proceedings below, the Florida Supreme Court and First District Court of Appeal found no language in Sec. 212.17(3), supra, which conferred a right to a tax refund, even in situations where the seller has insufficient future sales tax liabilities to claim the full amount of the credit due on its uncollectible accounts.

B. PROCEEDINGS BELOW

On March 29, 1977, Grant requested a refund of $520,060.00 in Florida sales tax, pursuant to the provisions of Sec. 215.26. The application stated as the

ground for the requested refund an "overpayment of Florida's sales tax in the amount of §520,060.00." The refund application stated that Grant had made numerous "sales" pursuant to several different types of credit plan, with the tax collected on the credit sale "at the time the sale was made." The application stated that many of the accounts receivable generated by the credit sales were later found to be uncollectible and were therefore written off the company's books, but that, because of Grant's adjudication as a bankrupt, the bad debts could no longer be offset or credited against future retail sales.

On April 15, 1977, the Comptroller of the State of Florida notified Grant that it would deny the refund claim based on an audit and recommendation from the Department of Revenue for denial of the

claim because a refund was not authorized by Sec. 212.17(3), F.S. Thereafter, Grant requested a rehearing, asserting both Secs. 212.17(3) and 215.26, F.S., 1975, as authority for a refund. The Department of Revenue denied this request on behalf of the Comptroller, which denial was later confirmed by notification from the Comptroller.

Under the provisions of Sec. 120.68, F.S., 1975, 1977, Grant petitioned the District Court of Florida to review the administrative actions of the Comptroller and Department of Revenue. The District Court of Appeal concluded that the agencies had properly denied Grant's refund request and dismissed the petition. Estate of W.T. Grant Co. v. Lewis, 358 So.2d 76 (Fla. 1st DCA 1978). Grant appealed to the Florida Supreme Court, which affirmed the First District Court of Appeal.

Estate of W.T. Grant Co. v. Lewis, 370 So.2d 764 (Fla. 1979).

ARGUMENT

THIS APPEAL RAISES NO SUBSTANTIAL FEDERAL QUESTION

Grant's jurisdictional statement filed in this Court raises two questions which Grant asserts warrant this Court to take jurisdiction. It is the position of the Appellees that neither of these questions, as framed herein, is sufficiently substantial to justify this Court in taking jurisdiction.

Grant's first contention is that it is denied due process and equal protection of the laws. It appears, however, that Grant's primary concern is with an alleged denial of equal protection. It is alleged that the bankrupt is singled out for a denial of the economic benefit accorded to all other retail merchants because it alone is unable to claim the benefit of

the credit provision of Sec. 212.17, F.S., Grant cites specifically to this Court's decisions in Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1934, 40 L.Ed.2d 189 (1974) and Allied Stores of Ohio v. Bowers, 385 U.S. 522, 2 L.Ed.2d 480 (1959) as supportive of its contention.

Its reliance on these cases is misplaced. These very cases, as well as such other decisions from this Court as Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) and San Antonio School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) have stressed the latitude given the states in structuring their fiscal policies so that distinctions and classifications may be drawn by a legislature in tax or other fiscal matters so long as they have a rational relationship to legitimate state purposes.

The Florida First District Court of Appeal properly disposed of Grant's argument. It noted that the transactions were fully taxable at the measure on which the tax was paid. Moreover, for all that can be told from the record, the sales were not "frustrated" or "thwarted" as Grant's statement suggests. Rather, the goods have apparently been delivered to the purchaser and Grant reimbursed through some combination of cash and an account receivable. Where the account receivable does go bad prior to being completely paid off, the Florida Legislature has apparently determined to give the taxpayer some relief, even though the full amount of tax remitted was actually due on the sale when it took place. However, it was obviously the determination of the legislature that it did not want a negative cash flow from the treasury such as would be the case if the seller had an opportunity to claim a refund.

This policy also accounts for the difference in treatment afforded in Sec. 212.17, F.S., between bad debt writeoffs, where only a credit is allowed, and returned or repossessed goods where the seller is allowed to claim a refund. In the latter two circumstances, as the District Court of Appeal pointed out, the goods are returned to the seller's inventory and are available for resale, thus having the potential to generate additional sales tax. Where the debt is simply written off without the return of the goods, no new tax can be generated.

Grant's argument that the statute discriminates against the bankrupt as opposed to those who terminate business in some other manner is speculative at best and is not supported anywhere in the record. The statute on its face is nondiscriminatory and contains no special

provisions dealing with bankrupts or those who terminate business in some other fashion. It simply provides a credit to be taken against future tax liability. This credit is similarly unavailable to any retail seller who does not have sufficient future retail sales to claim it, regardless of the reason. Indeed, it is even unavailable to a continuing business whose volume of Florida retail sales does not generate enough tax liability to absorb the credit. The argument that one who closes a business voluntarily has more latitude to plan to absorb the credit is highly speculative at best. No elaboration is given, and many of the same choices available to a voluntary dissolution of a retail business are also available to the trustee in terminating the affairs of the bankrupt. In short, the distinctions made by the statute, Sec. 212.17, F.S., clearly have a rational

relationship to legitimate state purposes.

Secondly, Grant argues that Sec. 212.17(3), F.S., conflicts with the federal bankruptcy act by "barring" it from obtaining a refund, and therefore violates the Supremacy Clause of the Federal Constitution. Initially, it must be observed that Grant has misstated the question. Strictly speaking, Sec. 212.17(3), supra, does not bar Grant from obtaining a refund. It simply does not contain any provisions allowing a refund in the circumstances in which Grant finds itself. Thus, the implication that but for this statute, Grant would be able to obtain its refund is not correct at all. If this statute did not exist, or were to be declared unconstitutional for some reason, Grant would still not be able to obtain a refund because there is no other provision of Florida law which authorizes one. Grant has identified nothing in the Bankruptcy Code which would entitle it to a refund of state taxes

which were not authorized under some principle of state law.

Grant's primary reliance is on the case of Perez v. Campbell, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971). This case is not on point at all. In Perez his Court struck down a provision in Arizona's motor vehicle law which suspended a driver's license and registration where there was an unsatisfied tort judgment against him arising out of an automobile accident, even though that judgment might have been discharged in bankruptcy. This Court held that one of the primary objectives of the bankruptcy act was to give the discharged debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt. Since the Arizona statute constituted a strong pressure to satisfy this judgment, even though

discharged in bankrupty, if a person wished to exercise driving privileges, the statute was inconsistent with the purpose of the federal act, violating the supremacy clause.

In the present case, the State of Florida has done nothing more than deny a refund of taxes which were properly due and owing to the state in their entirety at the time they were paid. This denial, in no way frustrates the complete discharge of the bankrupt, as did the Arizona statute in Perez. It does not in any way constitute an inducement or incentive for the bankrupt to pay or discharge any liabilities which were discharged in bankruptcy. Moreover, if the business is truly bankrupt, denying it a tax refund would certainly not discourage it from entering bankruptcy. In short, there is no purpose in the bankruptcy act identified in the jurisdictional statement which is frustrated by denying Grant a refund not authorized by statute.

CONCLUSION

For the reasons set forth herein, this Court lacks jurisdiction. An order should be entered dismissing this appeal, or alternatively affirming the judgment entered herein by the Supreme Court of Florida.

Respectfully submitted,

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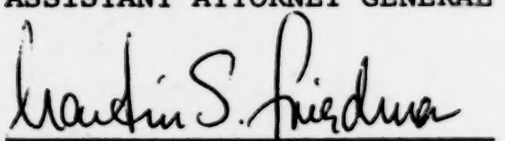

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